No. 1, Miscellaneous

In the Supreme Court of the United States

OCTOBER TERM, 1948

GRACE W. ADKINS, AS ADMINISTRATRIX OF THE ESTATE OF P. V. ADKINS, DECEASED, PETITIONER

v.

E. I. DUPONT DE NEMOURS & CO., INC., RESPONDENT

THE UNITED STATES OF AMERICA, INTERVENOR

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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an affidavit of his poverty, and it is, therefore, difficult to understand how the motion for leave to proceed *in forma pauperis* puts the validity of such an agreement in issue. If such an agreement is valid, and a lawyer's affidavit necessary, the affidavit is on file; if the agreement is invalid the attorney would have no contingent interest in the recovery and the affidavit can be disregarded. In either event the requirements of the *in forma pauperis* statute are (on this point at least) fully satisfied. Nevertheless, in view of this Court's direction we shall consider the question.

Section 16 (b) of the Fair Labor Standards Act, as amended (June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069, amended May 14, 1947, c. 52, § 5 (a), 61 Stat. 87; 29 U. S. C. (1946 ed., Supp. I) 216 (b); *infra*, pp. 48–49) provides, in part, that any employer who violates the minimum wage or maximum hour provisions of the Act shall be liable to his employees affected "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated

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consider such a request. We sincerely trust you appreciate our position in this matter, and we likewise respect yours."

It appears that the twelve claimants involved did designate petitioner as their agent, pursuant to Section 16 (b) of the Fair Labor Standards Act, as it read prior to the enactment of the Portal-to-Portal Act of 1947 (June 25, 1938, c. 676, § 16, 52 Stat. 1069; 29 U. S. C. 216 (b), *infra*, pp. 48–49), to maintain the action for them "for a consideration contingent upon recovery." The right to designate such an agent has since

damages" and that the court, in addition to any judgment awarded to such employees for those sums, shall "allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." We assume that there could be no question of the validity of a contingent fee agreement in a Fair Labor Standards Act suit if the fee were so limited that in no event would the return to counsel exceed the court's allowance. Although the contingent fee is apparently still illegal in England and is regarded with disfavor even in some quarters in this country (see Smith, *Justice and the Poor* (1924), pp. 85, 86; Cohen, *The Law—Business or Profession?* (1924), p. 206), it is now clearly valid in the United States. See Radin, *Contingent Fees in California*, (1940) 28 Calif. L. R. 587.[7] A problem arises only where the

been withdrawn, however (May 14, 1947, c. 52, § 5 (a), 61 Stat. 87; 29 U. S. C. (1946 ed., Supp. I), 216 (b)), and we assume that the Court did not have reference to the validity of such a contingent fee arrangement.

[7] Professor Radin says, in part (p. 598): "* * * It would be better for both the bar and the public if the need for contingent fees was not merely recognized, as it can scarcely help being, but if it was regarded, not as a regrettable decadence from a loftier standard, but as an institution that serves an important purpose * * *." And, again (p. 589): "The case for and against a contingent fee, if we disregard considerations of history and what may be called snobbery, may be briefly summarized. The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimants. Of these two possibilities, the social advantage seems clearly on the side of the contingent fee."

agreement contemplates a fee greater than or in addition to the "reasonable" attorney's fee to be awarded by the court. The same problem would appear to be presented if the arrangement between counsel and client provided for a fixed fee greater than that awarded by the court, but in fact the issue has been considered only in connection with contingent fees.

As to those arrangements, there is a diversity of opinion. The weight of authority frowns on such contingent-fee agreements. *Harrington* v. *Emmitt Const. Co.*, 167 F. 2d 389 (C. C. A. 4); *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527 (C. C. A. 2), certiorari denied, 331 U. S. 812; *Maddrix* v. *Dize*, 153 F. 2d 274 (C. C. A. 4); *Burke et al.* v. *Mesta Machine Co.*, Civ. No. 2744, U. S. Dist. Ct., W. D. Penna., July 27, 1948, 15 Labor Cases (CCH), par. 64,673. There is, however, some respectable authority to the contrary. *Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292 (D. Mass.); *Aucoin* v. *Mystic Waste Co.*, 55 F. Supp. 672 (D. Mass.); *Monty* v. *Christiansen*, 47 F. Supp. 273 (D. Wisc.); *Miller* v. *Fox-Pelletier Intern. Detective Agency*, No. 1259, W. D. Tenn., June 11, 1947, 13 Labor Cases (CCH), par. 64,167; *S.-H. Robinson & Co.* v. *Larue*, 25 Tenn. App. 284, affirmed, 178 Tenn. 197; *Fiedler* v. *Potter*, 180 Tenn. 176.

All the reported decisions in opposition to the contingent fee arrangement are grounded on a respect for the presumed intent of Congress that

"the employee * * * collect and retain not only the amount of wages due and an additional sum of equal amount as liquidated damages, but also a sufficient sum to pay his lawyer * * *." *Harrington* v. *Empire Const. Co.*, 167 F. 2d 389, 392 (C. C. A. 4). A private contract for payment over of any part of the wages and liquidated damages to counsel or to anyone else is deemed a frustration of that congressional purpose. In the *Harrington* case, *supra*, the court thought that the legislative design was "obvious" (167 F. 2d at 392) and conditioned the payment of the attorney's fee allowed on the surrender by employee's counsel of all rights to additional compensation under a private retainer agreement. Similarly, in *Maddrix* v. *Dize*, 153 F. 2d 274, 275–276, the same court considered it obvious that "Congress intended that the wronged employee should receive his full wages plus the penalty without incurring any expense for legal fees or costs." In *Skidmore* v. *John J. Casale, Inc.*, 160 F. 2d 527, 531, the Second Circuit Court of Appeals, though it found that the question was not properly before it, expressed "considerable doubt as to the validity of the contingent fee agreement; for it may well be that Congress intended that an employee's recovery should be net, and that therefore the lawyer's compensation should come solely from the employer."

There is some, though little, support for this position in the legislative history of Section 16

(b). The section first appeared in the bill as it was reported by the Conference Committee of both Houses, but the report of that committee makes no reference to the provision for attorney's fees. H. Rep. No. 2738, 75th Cong., 3d sess. In the debates prior to the adoption of the conference report, however, Representative Keller did refer to the provision, as follows (83 Cong. Rec. 9264):

> Among the provisions for the enforcement of the act an old principle has been adopted and will be applied to new uses. If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit * * *.

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, such remarks and the policy considerations underlying the enactment of the Fair Labor Standards Act were said to denote a jealous regard on the part of Congress for securing to the employee, unabridged by private waiver or other agreement, the full amount of the minimum and overtime wages and liquidated damages to which the Act entitled him. By the same token, it

would seem that any contingent fee contracts contemplating a payment over to his attorney of some portion of his recovery must be rejected. The opposing viewpoint is expressed in the opinion of Judge Wyzanski in *Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292, 297 (D. Mass.): "Unlike workmen's compensation acts and similar legislation * * * [the Fair Labor Standards] Act does not limit the lawyer's fee." See, *e. g.*, Act of June 7, 1924, as amended, 38 U. S. C. 551; *Hines* v. *Lowrey*, 305 U. S. 85. The silence of Congress in that regard suggests that no limitation whatever was intended. It is true that Section 16 (b) provides that only a "reasonable" attorney's fees shall be allowed, but that limitation may be applicable only so far as the judgment against the employer is concerned. The courts which see no fault in the private fee agreement in Fair Labor Standards Act suits view the matter of the attorney-client relationship as quite separate and apart from the question as to the statutory liability of the employer. Various justifications for such a construction are suggested (*Hutchinson* v. *William C. Barry, Inc.*, 50 F. Supp. 292, 297 (D. Mass.)):

> * * * The plaintiff by recovering double damages gets what is in practice, though not in theory * * *, more likely to be a windfall than a compensation for damages suffered. The attorney's fee is a further addition to the amount payable to

> the plaintiff, not * * * to the attorney. And the plaintiff, by virtue of the double damage award, already has margin enough to pay his counsel's fee. Moreover, the rights of counsel are not foreclosed by a decision under Section 16 (b) of the Act. * * * A lawyer can make private arrangements with his client for a fee larger than the Court orders the defendant to pay * * *."[8]

As a practical matter, it may well be that unless contingent fees in addition to or in excess of the courts' awards are permitted, many meritorious claims of employees will go by the board. A study of the cases leads one recent commentator to conclude that "the primary factor influencing the size of the fee is the attitude of the

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[8] To the same effect is *Aucoin* v. *Mystic Waste Co.*, 55 F. Supp. 672, 673 (D. Mass.), where in fixing an attorney's fee in another Fair Labor Standards Act case, the court disposed of an antecedent agreement between the plaintiff and his attorney as follows:

"* * * The Fair Labor Standards Act does not in terms prohibit an employee from paying or an employee's lawyer from charging more than a court awards as a reasonable attorney's fee. However, where the agreement between the employee and his counsel sets a figure higher than what the court considers a reasonable attorney's fee, the agreement is not relevant. Where the agreement sets a figure lower than what the court considers a reasonable attorney's fee, it may be that the employee cannot recover from the employer an attorney's fee in excess of the agreement between the employee and his counsel. The excess would not represent damages sustained by the employee and, therefore, it might not fall within the provisions of the act for a reasonable attorney's fee."

court toward the FLSA generally and the rule of law governing the case in particular." Gerber and Galfand, *Employees' Suits Under the Fair Labor Standards Act* (1947), 95 U. Penna. L. R. 505, 532. The court's attitude toward the plaintiff is also an important factor. *Id.*, at 532–533; see, *e. g., S. H. Robinson & Co.* v. *Larue,* 178 Tenn. 197, in which only $1 attorneys' fee was allowed. In view of the uncertainties in the size of the fees allowed, which such irrelevant considerations must inevitably engender, it has apparently "become general practice for attorneys to insure themselves against low court-awarded fees by separate fee contracts with the plaintiffs * * *." *Id.*, at 536. If such protective arrangements are outlawed, lawyers may be loath to risk losses in prosecuting Fair Labor Standard Act claims.

An equally significant consideration is the fact that the average wage-earner usually does not feel that he has sufficient funds to enable him to retain an attorney on a fixed fee, payable whether or not the suit is successful; consequently, he must resort to a contingent fee arrangement. See Brown, *Lawyers and the Promotion of Justice* (1938), pp. 207–218. The attorney's risk of loss under such an arrangement, if the suit is lost, is, of course, taken into account in determining the size of the contingent fee, which consequently is bound to be somewhat higher than one which would be payable for similar services, win or lose. Cf. *Taylor* v. *Bemiss,*

110 U. S. 42, 45. Unless the "reasonable" fee allowable under Section 16 (b) is to reflect this increment, attorneys are likely to refuse to handle Fair Labor Standards Act suits except on a contingent fee basis. If it is to reflect the increment, however, employers will be subjected to what is perhaps an unfair penalty for the penury of their employees.

Such contingent agreements should at all times be subject to the surveillance of the courts. *Taylor* v. *Bemiss,* 110 U. S. 42; *Ridge* v. *Healy,* 251 Fed. 798 (C. C. A. 8). Thus, the employee would in large measure be protected against extortionate arrangements. On the other hand, if all agreements for contingent fees in addition to or in excess of court-awarded fees were outlawed, he might, as a practical matter, find it difficult to procure adequate legal services.

The Administrator of the Wage and Hour Division has advised the Department of Justice that he feels the question of the validity of the contingent fee agreement has "too remote a bearing on the duty of administering and enforcing the Act to warrant his taking any position." We have presented the authorities and the arguments on both sides of the question for the information of the Court.

II

THE NECESSITY FOR AN ATTORNEY'S AFFIDAVIT OF POVERTY

The *in forma pauperis* statute, as it read at the time the motion pending here was filed, pro-

vided that any citizen might procure leave from any court of the United States to proceed *in forma pauperis,* "upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal * * *." Act of July 20, 1892, c. 209, § 1, 27 Stat. 252, as amended; 28 U. S. C. (1946 ed.) 832, *infra*, p. 46. Literally, this would seem to require affidavits only from the parties to the litigation, but the courts have nevertheless applied the statute to require affidavits also from all other persons directly interested in the recovery. Where "the action is prosecuted for the joint benefit of several persons, the petition to proceed *in forma pauperis* is insufficient unless each person directly interested in recovery makes the poverty affidavit required by the statute * * *." *In re American Mounting and Dye Cutting Co.*, 126 F. 2d 419 (C. C. A. 8); *Carter* v. *Kurn*, 120 F. 2d 261 (C. C. A. 8); and, see, to same effect, *Boggan* v. *Provident Life and Accident Insur. Co.*, 79 F. 2d 721 (C. C. A. 5); *Reed* v. *Pennsylvania Co.*, 111 Fed. 714 (C. C. A. 6); *Clay* v. *Southern Ry.*, 90 Fed. 472 (C. C. A. 6).

Thus, it seems clear that before petitioner could be allowed to prosecute her appeal *in forma pauperis* here, affidavits of poverty would have to be filed by the claimants whom she represents as agent. For, as stated in the complaint

(par. 3), this action was instituted and has been prosecuted "for and on their behalf"; petitioner's interest is only indirect, and her success is wholly dependent on the merits of their claims.[9]

When petitioner made her first applications for leave to proceed *in forma pauperis* to the District Court and Court of Appeals, it was apparently suggested that the requirements of the statute might not have been fully satisfied because petitioner's attorney had failed to submit an affidavit as to his poverty. Both courts below were of the opinion that such an affidavit was necessary where an applicant's attorney was retained on a contingent fee basis. But, as already noted, *supra*, pp. 14–15, the record does not show whether such a contingent fee agreement was entered into here. Furthermore, even if such an arrangement were made, petitioner's counsel has

[9] Eleven of the employees petitioner represents have executed affidavits of poverty, and if those affidavits are sufficient in content—a matter we shall consider below—there seems to be no reason why the refusal of the twelfth claimant to join should prejudice any claim other than his own. We suggest, therefore, contrary to the holding of the District Court, that V. J. Blevins' failure to submit an affidavit as to his inability to advance the costs of the appeal may prevent the prosecution of the appeal on his behalf *in forma pauperis*, but that the appeal on behalf of the other eleven claimants should be unaffected by his silence. But cf. *Walker* v. *Equitable Mtge. Co.*, 114 Ga. 862, 866–867; *Ostrander* v. *Harper*, 14 How. Prac. (N. Y. Sup. Ct.) 16, 17–18.

an affidavit on file, and the issue as to its necessity, therefore, need not be decided.[10] Nevertheless, since the questions raised by the motion for leave to proceed *in forma pauperis* are not defined and since this very question was apparently considered below, we discuss it here.

The majority of the decisions in point have required the filing of an affidavit by a contingent fee attorney. *United States ex rel. Randolph* v. *Ross*, 298 Fed. 64 (C. C. A. 6); *Bolt* v. *Reynolds Metal Co.*, 42 F. Supp. 58 (W. D. Ky.); *Esquibel* v. *Atchison, T. & S. F. Ry. Co.*, 206 Fed. 863 (D. N. M.); *Feil* v. *Wabash R. Company*, 119 Fed. 490 (W. D. Mo.); *Phillips* v. *Louisville and N. R. Co.*, 153 Fed. 795 (C. C. N. D. Ala.); *The Bella*, 91 Fed. 540, 543 (D. Wash.); *Boyle* v. *Great Northern Ry. Co.*, 63 Fed. 539 (C. C. D. Wash.); *Gomez* v. *Superior Court of Los Angeles County*, 134 Cal. App. 19; *Silvas* v. *Arizona Copper Company*, 213 Fed. 504, 507–508 (D. Ariz.); Rule 26 (1), Rules of United States Circuit Court of Appeals for the Third Circuit; Rule 18 (2), Rules of United States Circuit Court of Appeals for the Sixth Circuit; *Chetkovich* v. *United States*, 47 F. 2d 894 (C. C. A. 9), but see *Deadrich* v. *United States*, 67 F. 2d 318

[10] If this Court concludes that a contingent fee arrangement would be invalid in a Fair Labor Standards Act suit, the attorney would have no interest in the recovery and would not have to file an affidavit of poverty.

(C. C. A. 9). There is, however, considerable authority to the contrary. *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331 (C. C. A. 2); *United States ex rel. Payne* v. *Call*, 287 Fed. 520 (C. C. A. 5); *Jacobs* v. *North Louisiana and Gulf R. R. Co.*, 69 F. Supp. 5 (W. D. La.); *Clark* v. *United States*, 57 F. 2d 214 (W. D. Mo.); *Evans* v. *Stivers Lumber Co.*, 2 F. R. D. 548 (E. D. Tenn.); *Stevens* v. *Sheriff*, 76 Kans. 124; *Loftin* v. *Frost-Johnson Lumber Co.*, 133 La. 644; *State ex rel. Malouf* v. *Merrill*, 165 Wisc. 138; *Hogg* v. *Chicago and Alton R. R. Co.*, 168 Ill. App. 609, 613–614. So far as we have been able to ascertain, this Court has never expressed an opinion on the question.

We submit that the minority rule is correct. Those courts which require the filing of an affidavit by an attorney employed on a contingent fee basis premise their holding on an analogy which they assume between the interest of such an attorney and those of the beneficiaries of decedents' estates (see, *e. g., Carter* v. *Kurn*, 120 F. 2d 261 (C. C. A. 8)) or of the creditors of bankrupt estates (see, *e. g., In re American Mounting and Dye Cutting Co.*, 126 F. 2d 419 (C. C. A. 8)). In their view, such a contingent fee attorney is "a person who acquires by contract an interest in * * * [the] litigation, and a right to share in the fruits of a recovery" and is, therefore, not entitled to sue *in forma pauperis* and, thus, be permitted "under cover

of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people." *Boyle* v. *Great Northern Ry. Co.*, 63 Fed. 539 (C. C. D. Wash.). To the suggestion that the rule they announce is, in effect, a compulsion of champertous practice, these courts respond either that the state statutes in point do not prohibit the payment of costs by an attorney or that the mere filing of a cost bond by an attorney is but a guarantee of his client's obligation to pay the costs and not payment on the attorney's account. *United States ex rel. Randolph* v. *Ross*, 298 Fed. 64, 65–66 (C. C. A. 6).

There are, however, some states where an agreement by attorneys to defray the costs of litigation would be against public policy and would constitute an illegal champertous agreement. See *Quittner* v. *Motion Picture Producers & Distributors of America*, 70 F. 2d 331 (C. C. A. 2).[11] In such states, then, a poor plaintiff unable to advance the costs or to secure their payment would be put to the choice of finding himself equally poor counsel or of foregoing his lawsuit. And to suggest, as some courts do (see *United States ex rel. Randolph* v. *Ross*, 298 Fed. 64, 65–66), that,

[11] The status of such an agreement in Oklahoma, of whose bar petitioner's counsel is a member, is doubtful. The applicable statute, 21 Okla. Stats. Anno. § 559, would seem to prohibit an arrangement of that character. But the statute apparently is based on an old Dakota provision (Comp. Laws Dak. 1887, § 6397), and that provision has been held to permit such an agreement. *Woods* v. *Walsh*, 7 N. D. 376.

in any event, it would not be champertous for the attorney to file a cost bond or lend the money for payment of the costs to his impoverished client is, in our opinion, to blink at the facts; for it should be plain, especially to the attorney, that unless the suit proves successful there would be little likelihood that the "loan" would be repaid.

Since attorneys of means might not be willing to assume the burden of the costs themselves, to deny to litigants who have retained counsel on a contingent fee basis the right to proceed *in forma pauperis* unless their attorneys sign affidavits of poverty would often be to relegate indigent parties to pauperized attorneys. We submit that that is a perversion of the humane purpose underlying the *in forma pauperis* statute: "to assist the poor and afford an opportunity to prosecute their just claims where, if they met the costs of litigation, it would be prohibitive. It would conflict with the phrase of the statute and surely with its spirit to say that not only must the litigant who sues show himself to be a pauper, but that his attorney must be found in the same category. The statute was intended for the benefit of those who are too poor to give security for costs; it was not intended to compel pauper lawyers to represent them; it is an affront to the dignity of the profession to think otherwise." *Quittner* v. *Motion Picture Producers and Distributors of America*, 70 F. 2d 331, 332 (C. C. A. 2).

Nor are we impressed by the fear which some announce that to excuse the contingent fee attorney from making the affidavit of poverty would result in the "greater evil" of "opening the door to litigation which may or may not prove meritorious." *United States ex rel. Randolph v. Ross*, 298 Fed. 64, 66 (C. C. A. 6). We have found no data which would lead one to conclude that there is a greater incidence of unworthy litigation among the poor than there is among those easily able to afford the expense of a lawsuit. To the contrary, such studies as have been made of the effect of poverty on litigation suggest that there is much greater danger to society in discouraging small causes than in encouraging them by liberalizing the requirement for court costs. See Pound, *Organization of Courts* (1940), p. 263; Willoughby, *Principles of Judicial Administration* (1929), pp. 569–575; Maguire, *Poverty and Civil Litigation* (1923), 36 Harv. L. R. 361, 400–404; Pound, *The Administration of Justice in the Modern City* (1913), 26 Harv. L. R. 302, 315–321; Smith, *Denial of Justice* (1919), 3 Jour. Am. Jud. Soc. 112, 115, 126; Theophilus, *The Small Wage Earner in Legal Trouble* (1939), 205 Ann. Am. Ac. Pol. Soc. Sc. 43, 49.

If the Court considers that the question is in the case, then, we believe it should declare unequivocally that attorneys, solely by reason of their professional interest in litigation, whether

Miscellaneous—Continued

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinions were announced below.

JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit denying petitioner's second application to appeal in forma pauperis was entered on January 5, 1948. The petition for a writ of certiorari, incorporating the motion for leave to proceed in forma pauperis and an application for an extension of time to docket the

record on appeal in the Court of Appeals, was filed on February 2, 1948. The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.[1]

QUESTIONS PRESENTED[2]

1. Whether a contingent fee agreement in a Fair Labor Standards Act suit is valid.

2. Whether it was necessary for an attorney retained on a contingent fee agreement to file an affidavit of his poverty in order to secure for his client leave to proceed *in forma pauperis* in accordance with the Act of July 20, 1892, as amended (28 U. S. C. (1946 ed.) 832–836).

3. A. Whether an affidavit of poverty submitted in support of an application for such leave must set forth in detail the financial condition of the affiant.

B. Whether, when a number of persons have a joint interest in an appeal, it is sufficient, to qualify under the *in forma pauperis* statute, for

[1] Effective September 1, 1948, that section was repealed and incorporated in the new Title 28, United States Code, as Section 1254 thereof. See Act of June 25, 1948 (P. L. 773, 80th Cong., 3d Sess.), sections 1, 38, 39. Jurisdiction to issue a writ of certiorari seems clear, but the authority of the Court may stem not from Section 240 (a), but rather from Section 262 of the Judicial Code (now incorporated in Section 1651 of the new Title 28). *Steffler* v. *United States*, 319 U. S. 38.

[2] It is doubtful whether Questions 1 and 2 are, in fact, in this case. See Discussion, *infra*, pp. 14–16, 26–27. The Court, however, has explicitly requested argument of Question 1, and Question 2 is suggested by the petition for certiorari.

each individually to file an affidavit that he cannot pay the total cost of appeal, or whether a showing that the group as a whole cannot bear the cost is necessary.

C. Whether an indigent can require the Government to pay for unnecessary portions of the record on appeal.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 46–49.

STATEMENT [3]

This action was brought in May, 1946, in the United States District Court for the Northern District of Oklahoma, by P. V. Adkins, as agent for twelve named claimants,[4] against the respondent company, a wartime Government cost-plus-a-fixed-fee contractor. Instituted pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (June 25, 1938, c. 676, § 16, 52 Stat. 1069, amended May 14, 1947, c. 52, § 5 (a), 61 Stat. 87; 29 U. S. C. (1946 ed., Supp. I) 216 (b)), the suit sought unpaid overtime compensation, liquidated damages, and attorney's fees in connection with

[3] The Statement is based, in most part, on the typewritten copies of pleadings, orders, letters, and other papers appended to the petition for certiorari.

[4] According to petitioner, Mr. Adkins had been designated and employed by these claimants to prosecute their wage claims "for and on a consideration of a certain percentage of any * * * recovery made."

so-called portal-to-portal claims for travel and "make ready" activities performed since January 1, 1942 in and about respondent's ordnance plant near Pryor, Oklahoma.

After respondent's answer had been filed, the case was referred to a special master, and, on April 22, 1947, after a hearing of some two weeks, he reported that all the claimants' activities which might otherwise be compensable were subject to the *de minimis* doctrine enunciated by this Court in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, and were, therefore, not compensable. Meanwhile, P. V. Adkins had died, and on April 9, 1947, with the consent of all parties, petitioner, his wife, was substituted in his stead.

On May 14, 1947, while the master's report was pending before the court, the Portal-to-Portal Act of 1947 (c. 52, 61 Stat. 84, 29 U. S. C. (1946 ed., Supp. I, 251–262)) was enacted, and respondent promptly invoked its provisions as an added defense to the suit. Petitioner thereupon filed a motion requesting a declaration that the Act was unconstitutional, and the court, pursuant to the Act of August 24, 1937 (50 Stat. 751, 28 U. S. C. (1946 ed.) 401), certified to the Attorney General that its constitutionality had been drawn in question. Granted leave to intervene, the United States, on September 10, 1947, filed its brief in support of the Act, urging, nevertheless, that if the court had any serious doubts as to its constitutionality and if it sustained the factual find-

ings of the special master, it should dismiss the action, without ruling on the constitutional question, under the *de minimis* doctrine.

On September 24, 1947, after hearing, the District Court concluded that the Portal-to-Portal Act was constitutional and that it deprived the court of jurisdiction, and, consequently, the court entered an order dismissing the action for want of jurisdiction. On October 8, 1947, petitioner's motions for a new trial and for amendment of the pleadings to conform to the evidence were denied, and on the same day the costs were taxed, in an amount of approximately $140.00 against petitioner, and in an amount of approximately $9,500.00 (the special master's fee and the cost of transcribing the record) against respondent. Petitioner then filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit.

It was at this point that petitioner's efforts to proceed *in forma pauperis* began. An application filed in the District Court sought leave to proceed with the appeal as a poor person because of the substantial expense involved in transcribing and printing the voluminous record designated and because of her financial condition, which rendered her unable to advance or to secure the costs of preparing that record. Petitioner stated that she was 74 years of age and the sole beneficiary of Mr. Adkins' estate, consisting of her dwelling house, appraised at $3,450; that

her only source of income and means of support was the rent she received on portions of this house; and that all of her income was required to provide her with the necessities of life. On November 4, 1947, the District Court, without hearing, denied the application. In a letter of that date addressed to petitioner's attorney, District Judge Savage wrote:

> This affidavit is not sufficient. See *Carter* v. *Kurn*, 120 F. 2d 261. In addition, with respect to necessity of counsel employed on a contingent fee basis executing the affidavit see *Chetkovich* v. *United States*, 47 F. 2d 894 and *De Hay* v. *Cline*, 5 F. Supp. 630.

Petitioner thereupon filed a similar appliction with the United States Court of Appeals for the Tenth Circuit, but on November 17, 1947, that court likewise denied her leave to appeal *in forma pauperis*. No reasons were assigned for that action, but on November 28, 1947, Circuit Judge Phillips addressed a letter to petitioner's attorney, apparently in response to a letter from him, suggesting the reasons for the court's action:

> * * * it appears * * *, that, in addition to Adkins, twelve other plaintiffs and the members of your firm, because of a contingent fee contract, are interested in the recovery and that such interests are direct. Cases construing 28 U. S. C. A. 832 hold that every person directly inter-

ested in the recovery must make the poverty affidavit required by the statute.

Even if the recovery of the twelve interested plaintiffs is not joint, the members of the firm would have to join in the affidavit if only one of the real parties in interest appeals. * * *

On or about December 18, 1947, petitioner filed a second application in the District Court for leave to proceed with the appeal *in forma pauperis*. This time, however, in addition to reaffirming her prior affidavit, petitioner annexed affidavits of ten of the twelve claimants involved, in each of which the affiant stated his belief that the action was just and that he should recover; that he was a citizen of the United States; and that "because of my poverty I am unable to pay or give security for the costs ($4,000) of such appeal and still be able to provide myself and my dependents with the necessities of life."

An affidavit of John W. Porter and John W. Porter, Jr., the attorneys constituting the law firm which was counsel of record for petitioner, was also submitted. The attorneys stated that they felt the action was meritorious and that petitioner should recover; that the costs of appeal had, however, been estimated at approximately $4,000; that the total liquid assets of the law firm did not exceed $2,000; that although the law firm had accepted employment as counsel for petitioner, John W. Porter, Jr. had done and would continue

to do substantially all of the work in the case, and the firm had assigned to him all right, title, and interest to any fees resulting from the litigation; and that John W. Porter, Jr., "because of his poverty, * * * is unable to pay or give security for said costs of appeal and still be able to provide himself and his dependents with the necessities of life." Petitioner explained that efforts to locate one of the twelve claimants, one John A. Hodges, had been unsuccessful, and that another, one V. J. Blevins, had refused to execute an affidavit, stating that if that were necessary, the appeal would have to go on without him.

A hearing was accorded petitioner on this second application, but on December 22, 1947, the District Court again denied her leave to appeal *in forma pauperis* on the grounds that she had offered no evidence in support of her application; that all of the claimants had not filed affidavits of poverty; and that the affidavits filed were "not sufficient in that they do not sufficiently set forth the financial condition of said plaintiffs as to whether said affiants are or are not without property, the substance of the affidavits being merely that it would constitute a hardship on said affiants to pay or secure the payment" of the $4,000 costs.

The transcript of the oral argument before the District Court shows that the court was also of the opinion that all the parties interested in the recovery "have at least got to chip in to the extent of their ability to pay; and whatever they

have, they have got to put in the pot for the purpose of taking the appeal". The court's oral remarks show that he was of the opinion that it was clearly insufficient for each affiant merely to state that he could not spend $4,000 personally, since such a "statement does not disclose complete inability * * * to at least pay a portion of the costs of this appeal." The court also stated that "the only thing I passed on was the constitutional question. I dismissed this case for lack of jurisdiction", without making findings of fact on the factual questions; the alleged expense of $4,000 for a transcript of the entire record on appeal was thus "wholly unnecessary"; and for that reason "I am persuaded to be more technical and more strict about requiring you to comply with the statute than I might be under other circumstances. I am satisfied that you can take a proper appeal that will preserve every question in this case that has been passed on by this Court at a rather nominal expense if you would ask for the right kind of a record".[5]

[5] The court pointed out that if the appellate court reversed on the legal issues it would be necessary to have the case remanded for the making of further findings of fact: "I can't see any necessity, under any circumstances, for you to take up this voluminous record to the Circuit Court of Appeals, in taking an appeal in this case in view of the fact that the case was dismissed by the Court solely upon the ground that the Court was deprived of jurisdiction to proceed further by virtue of the provisions of Section 2 of the Portal-to-Portal Act."

Petitioner again filed an application with the United States Court of Appeals for the Tenth Circuit, annexing the affidavits submitted to the District Court and in addition one of John A. Hodges, who had since been located, similar to those made by his fellow claimants. On January 5, 1948, the Court of Appeals entered an order denying this second application; no reasons for the denial were assigned.

On February 2, 1948, petitioner filed the petition for a writ of certiorari, incorporating therein a motion for leave to proceed in this Court *in forma pauperis* and an application for an extension of time to docket the record in the Court of Appeals. Since the issue of the constitutionality of the Portal-to-Portal Act was not raised by the petition, motion, or application, and the petition seemed concerned solely with the propriety of the denial of leave to petitioner to proceed in the Court of Appeals *in forma pauperis*, the United States waived its right to file a reply to the petition for certiorari. On June 1, 1948, this Court entered an order stating that it desired to hear argument on the questions presented by the motion for leave to proceed *in forma pauperis*, "including the question as to the validity of a contingent fee agreement in connection with a suit brought pursuant to the Fair Labor Standards Act."

SUMMARY

I

The cases are not in agreement as to whether a contingent fee arrangement is permitted under Section 16 (b) of the Fair Labor Standards Act. This brief reviews the authorities, and presents the arguments on both sides of the question.

II

There is also a diversity of opinion as to whether it is necessary for an attorney retained on a contingent fee basis to file an affidavit under the *in forma pauperis* statute. We believe that to require an attorney's affidavit of poverty is, in effect, to sanction a champertous practice under which attorneys would be encouraged to pay the costs of litigation in return for a contingent interest in the recovery of their poor clients. Moreover, to deny litigants who have retained counsel on a contingent fee basis the right to proceed *in forma pauperis* in the absence of such affidavits of counsel is to relegate indigent parties to pauperized attorneys. This is a perversion of the purpose underlying the *in forma pauperis* statute, and is obviously unfair to the needy litigant.

III

A. Although most of the affidavits filed here in support of the application for leave to proceed *in forma pauperis* do not set forth the financial condition of the affiants in detail, it is

questionable whether they are for that reason alone insufficient to satisfy the requirements of the *in forma pauperis* statute. The statute does not provide that the applicant's insolvency must be particularized, and some courts have held that the mere paraphrasing of the statutory language, as in the affidavits here, is enough to satisfy the statute. A better procedure might be for the court to investigate the financial responsibility of the applicant and his supporting affiants at the outset even as it now investigates the merits of the case sought to be prosecuted *in forma pauperis*. Such a procedure might more appropriately be required by court rule than retroactively in a particular litigated case.

B. The affidavits in this case each state merely that each affiant cannot pay the $4,000 estimated cost of appeal; there is no allegation that the interested affiants as a group are unable to pay the costs, or that any of them is unable to pay his proportionate share of the costs. Such averments should not be sufficient under the *in forma pauperis* statute. Before the Government is required to pay the costs of litigation, it should appear that the interested parties together are unable to do so.

C. The trial court believed the estimate of $4,000 costs grossly excessive, since there was no need for bringing the evidence before the appellate court in view of the narrow basis of the trial court's decision. A district court must have dis-

cretion to limit a party seeking to appeal *in forma pauperis* to those portions of the record which can be reasonably deemed to be necessary to the appeal, and thus to prevent abuse of the *in forma pauperis* privilege at the expense of the public. Where the affidavits show inability to pay costs excessively estimated, the parties should be given an opportunity to show, if they can, inability to pay the costs found by the trial court to be reasonably necessary to the appeal.

DISCUSSION

The Court has invited argument on "the questions presented by the motion for leave to proceed *in forma pauperis,* including the question as to the validity of a contingent fee agreement in connection with a suit brought pursuant to the Fair Labor Standards Act." What questions are raised by the motion, however, is not clear; indeed, the one question explicitly stated by the Court may not be in the case at all. Nevertheless, in view of the Court's order, we address ourselves initially to the issue which it has stated, and, thereafter, to several questions which apparently were considered in the lower courts and which are suggested by the pending motion—first, whether an affidavit of the poverty of an attorney retained on a contingent fee basis is necessary on an application by his client to proceed *in forma pauperis;* second, whether such affidavits as are filed must contain details as to the financial con-

dition of the affiants; and, third, whether the affidavits in this case were sufficient.

The Government's intervention in the District Court was limited to the issues of the constitutionality of the Portal-to-Portal Act and the application of the *de minimis* doctrine under the Fair Labor Standards Act. On the application for leave to proceed *in forma pauperis* in the District Court the United States Attorney suggested that the affidavits of poverty were insufficient, particularly since he thought that only a small record, not costing anything like $4,000, was necessary on the appeal. The Government did not participate in the *in forma pauperis* proceeding before the Court of Appeals. The issues now presented to this Court relate primarily to the application of the *in forma pauperis* statute and, in one respect, to the construction of the Fair Labor Standards Act. The interest of the United States in these issues is a general one, not affected by the circumstance that the Government was an intervenor below on the merits. This brief is accordingly submitted as a disinterested, objective discussion of the issues under review, in the hope that it may aid the Court in its consideration of the case.

I

THE VALIDITY OF CONTINGENT FEE AGREEMENTS IN FAIR LABOR STANDARD ACT CASES

There is considerable doubt whether the question of the validity of contingent fee agreements in Fair Labor Standard Act cases is, in fact,

presented by the pending motion. Neither the petition for certiorari, the motion, nor any of the papers filed in support thereof discloses the existence of such an agreement.

The judge of the District Court, in his letter of November 4, 1947, did refer to the rule requiring counsel employed on a contingent fee basis to execute an affidavit of poverty, but he did not say whether or not there was such employment here. And although Circuit Judge Phillips, in his letter of November 28, 1947, stated that it appeared that there was such a contingent fee agreement, we do not know where he got that information. It is noteworthy that the petition itself seems to negative any such arrangement: "the record is entirely void of any evidence of any contingent fee interest of Counsel."[6] Moreover, even if there were a contingent fee agreement here, petitioner's attorney has filed

[6] It was this statement which impelled the Solicitor General to write petitioner's counsel, on August 17, 1948, requesting advice "as to the exact nature of your interest as attorney and plaintiff's interest as agent for the other claimants in the litigation. We do not, of course, need to know the percentage or dollar and cent figures, but information at least as to the pattern of the fee and agency arrangements is essential." Petitioner's counsel responded to the Solicitor General as follows:

"We have your letter of Aug. 17th seeking information as to any fee arrangements in this matter, and we are indeed surprised at what you have to say in view of your status in the matter. Even so, we do not see where your request is necessitated by the Court's order setting the matter for hearing, and for that reason alone we would not see fit to further

it be in the nature of a contingent fee or otherwise, need not file affidavits of poverty in connection with applications for leave to prosecute such litigation *in forma pauperis*.

III

THE SUFFICIENCY OF THE AFFIDAVITS OF POVERTY FILED

If it is determined that all affidavits required by the *in forma pauperis* statute have been filed by petitioner, there still remains the question whether the showing required by the statute has been made. Petitioner's affidavit, made in October, 1947 and filed with her first application, states that she is "74 years of age and is the sole beneficiary of the Estate of P. V. Adkins, deceased," that "her only source of income and means of support is the renting out of portions of her home which constitutes said Estate appraised at $3,450, said home being located at 820 Callahan Street in the City of Muskogee, Oklahoma," and that all of her income "is used and required in providing her the necessities of life." The affidavits filed by eleven of the twelve claimants in connection with the second application contain no details whatever; each states that the affiant believes that the action is "just and that we should recover," but that because of his poverty he is "unable to pay or give security for the costs ($4,000.00) of such appeal and still be able to provide * * * [himself] and * * * [his]

dependents with the necessities of life." An affidavit similar in substance as to the allegation of poverty was made by petitioner's attorney.

So far as we know, no one has questioned the truth of the averments in the several affidavits. Nevertheless, the District Court held them inadequate. In its order denying petitioner's second application for leave to proceed as a poor person, the court found that the affidavits were "not sufficient in that they do not sufficiently set forth the financial condition of said plaintiffs as to whether said affiants are or are not without property, the substance of said affidavits being merely that it would constitute a hardship on said affiants to pay or secure the payment of the sum of Four Thousand Dollars ($4,000.00) for the making of a record in this cause." During the course of the hearing on this application, the court suggested that what must be shown is a "complete inability * * * to at least pay a portion of the costs of this appeal * * *. The showing must not only reflect a lack of funds to pay all costs, but likewise a lack of funds to pay any part of the costs * * *."

A. THE SUFFICIENCY OF A GENERAL AFFIDAVIT

Is a court within its discretion when it denies an application for leave to proceed *in forma pauperis* because the affidavits do not recite the financial condition of the affiants in detail, where no question is raised as to their veracity? The

discretion of a court to grant or deny such an application is broad (*Kinney* v. *Plymouth Rock Squab Co.*, 236 U. S. 43, 45-46), but it is by no means absolute and uncontrolled. *Ex parte Rosier*, 133 F. 2d 316, 330, 334 (App. D. C.). Thus, "it would be a clear abuse of discretion for a trial court to reject an application to commence an action *in forma pauperis*, the truth of the allegations of poverty in which was not contested and which on its face stated a cause of action and which contained nothing on its face indicating that it was frivolously or vexatiously filed." *Id.* at 331.

The statute, as it read at the time the motion pending here was filed, prescribed no fixed procedure; all that was necessary, so far as the applicant was concerned, was that he make "a statement under oath in writing, that because of his poverty he is unable to pay the costs * * * or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal" (28 U. S. C. (1946 ed.) 832, *infra*, p. 46).[12] In the light of such a provision and in the absence of any requirement

[12] The new code provision requires an "affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress." Section 1915 of the new Title 28, United States Code.

for a particularization of applicant's insolvency, a mere paraphrasing of the statutory language can be regarded as enough to satisfy the statute.[13] And so some courts have held, relying on their power to dismiss the entire case in the event of untruth (28 U. S. C. (1946 ed.) 835, new 28 U. S. C. § 1915 (d), *infra*, p. 47) and the availability of the sanctions against perjury (28 U. S. C. (1946 ed.) 833, *infra*, p. 47) as quite effective deterrents against false affidavits. *Woods* v. *Bailey*, 113 Fed. 390 (C. C. M. D. Penna.); *Ex parte Rosier*, 133 F. 2d 316, 317, 332 (App. D. C.); *McDuffee* v. *Boston & Maine R. Co.*, 82 Fed. 865 (C. C. D. Vt.); cf. *Wickelman* v. *A. B. Dick Co.*, 85 Fed. 851 (C. C. A. 2). Under this view, the denial of petitioner's application because the affidavits filed may have been wanting in detail was unjustified.

Apparently it is the practice for the courts to await some showing by the adverse party that the affidavits are in some respects false before shifting the burden to petitioner to bolster the averments by more specific evidence of poverty. This puts the responsibility for challenging the affidavits on the opposite party. We do not doubt, however, that the court or a representative of the Government (which pays the indigents' costs) has the power to institute in-

[13] Compare the forms of affidavit for leave to sue *in forma pauperis* recommended at 4 Cyc. Fed. Proc. Forms, § 2639; 8 Cyc. Fed. Proc. (2d ed., 1943), § 3678.

quiries on its own to test the truthfulness of the affidavits.

Affidavits setting forth only general conclusions, with no specific facts, are, however, not always trustworthy. A requirement that the details of an affiant's financial condition be revealed would doubtless tend to lessen exaggeration and to increase the likelihood that an affiant was telling the truth when he claimed impoverishment. It would often enable the court to determine from the face of the document and without further inquiry whether a party was entitled to proceed *in forma pauperis*. The use of general affidavits will often necessitate further questioning of the affiant and perhaps other investigation before a court should be satisfied.

Whether the general affidavit should be regarded as sufficient is an arguable question of policy. In view of the authorities holding such affidavits adequate, it would seem more appropriate, if this Court thought a more specific statement desirable in all cases, that it so provide by rule rather than retroactively in a particular case.

If the general statement is sufficient, we submit that the proper practice is for the district court to satisfy itself by oral inquiry or otherwise as to the affiant's financial condition, and not to rely too greatly on the action or inaction of the opposing litigant. The procedure followed by the courts when they examine the merits of the

case sought to be prosecuted *in forma pauperis* furnishes a helpful analogy. There, with or without a challenge from the other parties, a court, on its own motion, will carefully consider whether the litigation is meritorious or whether it is vexatious and frivolous. If the latter, the application to proceed as a poor person will be denied. Cf. *Whittle* v. *St. Louis & S. F. Ry. Co.*, 104 Fed. 286 (C. C. W. D. Ark.); *Brinkley* v. *Louisville & N. R. Co.*, 95 Fed. 345 (C. C. W. D. Tenn.); *Whelan* v. *Manhattan Ry. Co.*, 86 Fed. 219 (C. C. S. D. N. Y.). We can perceive no reason why a court should not likewise simultaneously investigate the financial responsibility of the applicant and his supporting affiants. This would serve to protect the public interest in which the adversary has no immediate concern.

B. THE AFFIDAVITS IN THIS CASE ARE INSUFFICIENT BECAUSE THEY DO NOT STATE THAT ALL THE INTERESTED CLAIMANTS TOGETHER CANNOT PAY THE COSTS OF THE APPEAL

Even if a general affidavit be held sufficient, however, it does not follow that the affidavits in this case are adequate.

We do not suggest that an affiant must aver destitution to avail himself of the privilege. Most of the reported cases imply that this is not necessary. Although some early decisions suggested that one must be absolutely indigent to qualify for the privileges of the *in forma pauperis* procedure, a mere showing of hardship being irrelevant (*Wickelman* v. *A. B. Dick Co.*, 85 Fed.

851 (C. C. A. 2); *Volk* v. *B. F. Sturtevant Co.*, 99 Fed. 532 (C. C. A. 1); see, also, *Fisher* v. *Johnston*, 24 F. Supp. 821 (N. D. Calif.)), the bulk of the cases and the more recent decisions treat inability to pay the particular costs involved as the touchstone.[14] *Jacobs* v. *North Louisiana and Gulf R. R. Co.*, 69 F. Supp. 5 (D. La.); *McDuffee* v. *Boston & Maine R. Co.*, 82 Fed. 865 (C. C. D. Vt.); *Thiel* v. *Southern Pacific Co.*, 159 F. 2d 61 (C. C. A. 9); *Fils* v. *Iberia, St. M. & E. R. Co.*, 145 La. 544, 554; *Scott* v. *Shreveport Rys. Co.*, 192 La. 495; *Gilmore* v. *Rachl*, 202 La. 652; *Carlisle* v. *Wilson*, 103 S. W. 2d 434 (Tex. Civ. App.); *Aguirre* v. *Hanney*, 107 S. W. 2d 917 (Tex. Civ. App.).

But this case presents a special problem, inasmuch as there are twelve claimants (excluding counsel and Blevins) interested in the recovery. Each has filed an affidavit of poverty in which he states that the affiant cannot afford payment of the estimated costs of $4,000. There is no showing, however, that each of them could not pay a

[14] Contemporary decisions suggest a definite departure from the rigorous attitude of Sir John Nicholl, in *Lovekin* v. *Edwards*, 1 Phil. 179, 183–184 (1810):

"To sue as a pauper is a great privilege of law, it belongs only to the necessity arising from absolute poverty, and from the absence of any other mode of obtaining justice; no person is entitled to the gratuitous labours of others who can furnish the means of providing them for himself; besides it places the adverse party under great disadvantages, it takes away one of the principal checks upon vexatious litigation; the legal claim to so great a privilege ought therefore to be clearly made out."

proportionate share of those costs, or that all of them together could not pay the total costs. It may be that these eleven affiants are unable to bear a $4,000 cost burden, but they have not so averred. But certainly, as a general matter, when a number of persons are joint plaintiffs or defendants, they are not entitled to be treated as indigents merely because each individual cannot afford to pay the costs of the entire case by himself. Cases, such as stockholders' or employees' suits, in which hundreds or even thousands of persons have a joint interest, are not inconceivable; in such cases the total costs might be very high, but the amount per person insignificant. There is no reason why the public should be saddled with costs in such proceedings.

So far as we have been able to ascertain, there are no reported cases dealing with this problem. But in cases in which several parties have a joint interest, it must be the rule that the group demonstrate that it cannot bear the cost burden. Affidavits such as we have here from each member of the group that he cannot do so are obviously insufficient. Because of their deficiency in this respect, the affidavits in this case would seem to be insufficient even on the assumption that an affidavit in general form is normally adequate.[13]

[13] We have no way of knowing whether, if given permission, affiants can show by additional and more detailed statements that all of them together are unable to pay the estimated $4,000 costs. The District Court indicated orally that

C. WHETHER AN INDIGENT CAN REQUIRE THE GOVERNMENT TO PAY FOR UNNECESSARY PORTIONS OF THE RECORD ON APPEAL

The remarks of the trial judge, referred to at page 9, *supra*, indicate that he was motivated in part by his belief that petitioner was unreasonable in requesting the preparation of the entire record instead of merely those portions which pertained to his ruling dismissing the case under the Portal-to-Portal Act.

That raises the question whether persons claiming rights *in forma pauperis* can require the public to pay for the preparation of portions of the record unnecessary to the appeal. In the ordinary case, where the appellant (or the appellee as losing party) must pay the appeal costs, he has an incentive to minimize the size of the record and not to include within it unnecessary items. The removal of this incentive for the indigent, whose costs are borne by the public, should not mean that he is completely free to enlarge the appellate record irrespective of the necessities of the case. We think it clear that the trial judge must have discretion to prevent such an abuse of the privileges granted under the *in forma pauperis* statute. Cf. *Estabrook* v. *King*, 119 F. 2d 607, 610 (C. C. A. 8), in which the court held that it was not an abuse of the trial court's discretion to deny an indigent an

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this defect was one reason for holding their affidavits insufficient, and they have made no effort to file additional affidavits directed to this particular point.

order compelling a transcript of testimony to be supplied to him at the cost of the Government where petitioner had "set out the substance of the desired testimony in his brief, and it could in no way effect the result here." The recent addition of Rule 75 (m) to the Federal Rules of Civil Procedure would seem to be a recognition of the trial court's discretion with respect to the preparation and settlement of records on appeal in *in forma pauperis* proceedings.

The trial court should, of course, allow counsel for the indigent reasonable latitude in designating the appellate record, and should only exclude material which the court is convinced is unnecessary to the appeal. An arbitrary exercise of discretion on the part of the trial court will, of course, be subject to correction by the appellate tribunal.

If the trial judge has such discretion to exclude unnecessary portions of the record, it follows that he need not allow an appeal *in forma pauperis* to a party who avers merely that he cannot pay the cost of an unnecessarily enlarged record. The trial court should estimate the cost of preparing the necessary record, and give to the alleged indigent an opportunity to show that he is unable to pay the costs found by the court to be reasonably necessary.

In this case, for example, it may be that the petitioner and other affiants jointly cannot pay $4,000 costs—a figure based upon the inclusion

within the record of all the evidence taken before the special master but not considered by the trial judge in his decision that the court has been divested jurisdiction of petitioner's case by the Portal-to-Portal Act. If this evidence were eliminated, the cost of the appeal might be, let us assume, only $400. It does not follow that because the affiants cannot pay $4,000, the eleven of them cannot pay $400. Thus, if the trial court properly concluded that the inclusion of the evidence in the appellate record was unnecessary, he would be required to hold insufficient the affidavits now on file. The appropriate course in such circumstances would seem to be for the trial court to give petitioner an opportunity, if she so desires, to file affidavits with respect to the claimants' joint ability to pay $400, or whatever the amount required to prepare the necessary record might be.

CONCLUSION AND RECOMMENDATIONS

In the present case, we believe the trial court regarded the affidavits of poverty as insufficient *inter alia*, both because the affiants did not show their joint inability to pay costs and because he thought the $4,000 cost estimate grossly excessive in view of the narrow scope of the issues which would be considered on the appeal. It is not clear, however, that he based his decision entirely on those grounds. Petitioner's counsel indicated that he was not certain as to just what she was required to show to qualify *in forma*

pauperis, and the uncertain state of the law on the subject to some extent justifies his confusion.

In the circumstances we believe that this Court should remand the case to the District Court for reconsideration of the entire question in the light of principles to be enunciated by this Court, and that petitioner should be accorded an opportunity to furnish additional evidence of the need for proceeding *in forma pauperis* if she so desires. We submit that this Court should hold that:

1. An attorney's affidavit of poverty is unnecessary even if the attorney has a contingent interest in the recovery.

2. A petitioner *in forma pauperis* must show that all of the parties interested in the recovery jointly are unable to pay the costs of appeal.

3. The showing of inability to pay must relate to the cost of preparing only those portions of the record which can reasonably be thought necessary to the appeal. The trial court should allow counsel considerable leeway in this respect but should see that the *in forma pauperis* privilege is not being abused.

This Court should also indicate, for the guidance of the trial court, what is meant by "inability to pay". Is it sufficient that a party possessing sufficient property to cover the costs cannot pay the costs without lowering his standard of living, that he avers that he is unable to pay the costs "and still be able to provide my-

self and my dependents with the necessities of life"? Is he impoverished if he owns real property worth substantially more than his share of the costs, and does it matter if the property is his dwelling house, or whether it is worth $3,000 or $100,000?

The trial court also suggested that an alleged indigent should pay as much of the costs as he can afford, and that the Government should only be required to pay the remainder. The statute is silent as to this, and the cases have not dealt with it, but such a construction of the act would not be unreasonable. Cf. *Pendley* v. *Berry and Towles,* 95 Tex. 72. It would be helpful generally, as well as to the disposal of this case, for this Court to express its views on this question.

We have dealt in this brief with the one question which the Court specifically defined in its order of June 1, 1948, and with several other questions which are suggested by the pending motion for leave to proceed *in forma pauperis.* We have proposed answers to some of those questions. In examining the available materials, however, we were impressed by the generally haphazard manner in which applications for leave to resort to the *in forma pauperis* procedure have been disposed of by the federal courts. Of course, under any conditions, such applications would have to be dealt with on an *ad hoc* basis, but it seems to us that the courts and needy litigants

would be immeasurably aided by the formulation in general court rules of a set of standards which, though flexible enough to protect the rights of the indigent, might enable the courts to handle their applications for leave to proceed as poor persons with a dispatch and a degree of confidence not now evident in their determinations. The adoption of such standards, however, might well await a comprehensive study of the entire procedure in its day to day workings. The Administrative Office of the United States Courts would seem to be particularly qualified to make such a study.

Respectfully submitted.

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APPENDIX

1. The Act of July 20, 1892 (c. 209, 27 Stat. 252; as amended June 25, 1910, c. 435, 36 Stat. 866; June 27, 1922, c. 246, 42 Stat. 666; January 31, 1928, c. 14, Sec. 1, 45 Stat. 54; 28 U. S. C. (1946 ed.) Secs. 832–836) read as follows:

> That any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, before or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal: *Provided,* That in any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct

that the expense of printing the record on appeal be paid by the United States, and the same shall be paid when authorized by the Attorney General.

SEC. 2. That after any such suit or action shall have been brought, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases.

SEC. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

SEC. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

SEC. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: *Provided,* That the United States shall not be liable for any of the costs thus incurred.[1]

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[1] Effective September 1, 1948, these provisions were repealed and their substance incorporated in Section 1915 of the new Title 28 of the United States Code, which reads as follows:

"§ 1915. Proceedings in forma pauperis:

"(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen

2. Section 16 (b) of the Fair Labor Standards Act of 1938 as originally enacted (June 25, 1938, c. 676, § 16 (b), 52 Stat. 1069; 29 U. S. C. (1946 ed.) 216 (b)) reads as follows:

> Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of compe-

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who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

"An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

"(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of furnishing a stenographic transcript and printing the record on appeal, if required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

"(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

"(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

"(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases and if the United States has paid the cost of a stenographic transcript for the prevailing party, the same shall be taxed in favor of the United States."

tent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.[2]

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[2] As to actions commenced on or after May 14, 1947, these provisions were amended by the Portal-to-Portal Act of 1947 (May 14, 1947, c. 52, § 5 (a), 61 Stat. 87) to read as follows:

"Any employer who violates the provisions of section 6 or section 7 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

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